(1)

Supreme Court, U.S.
FILED

03 306 AUG 20 2003

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiffs-Respondents,

v.

KENNETH ALEXANDER,

Defendant-Petitioner.

On Petition for Writ of Certiorari from the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

DONALD J. MORRISON
Counsel of Record
MORRISON & MORRISON, P.C.
32 North West Street
Waukegan, Illinois 60085
(847) 244-2660

Attorney for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

48 pp

QUESTION PRESENTED FOR REVIEW

Is the Illinois Child Pornography Statute an unconstitutional abridgement of free speech pursuant to this Court's holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002)?

PARTIES TO THE PROCEEDING

I. **Petitioner (Defendant below)**
KENNETH ALEXANDER

II. **Respondent (Plaintiff below)**
PEOPLE OF THE STATE OF ILLINOIS

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

CITATION TO THE OFFICIAL REPORTS BELOW v

BASIS FOR JURISDICTION IN THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

ARGUMENT 6

CONCLUSION 16

APPENDIX ..... App. 1

TABLE OF CITED AUTHORITIES

Cases PAGE(S)

Ashcroft v. Free Speech Coalition,
535 U.S. 234, 122 S.Ct. 1389 (2002) ..... *passim*

Miller v. California,
413 U.S. 15, 93 S.Ct. 2607 (1973) 7

New York v. Ferber,
458 U.S. 747, 102 S.Ct. 3348 (1982) ..... *passim*

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803,
120 S.Ct. 1878 (2000) 6, 7

Statutes

U.S.C.A. Const. Amend. 1 ..... 1, 2, 7

720 ILCS 5/11-20.1(a)(1) ..... *passim*

720 ILCS 5/11-20.1(a)(6) ..... *passim*

720 ILCS 5/11-20.1(f)(7) 4, 5

720 ILCS 5/11-20.1(f)(4) 3, 10, 11

720 ILCS 5/11-20.1(f)(5) 3, 13

18 U.S.C. § 2256(8)(A) 9, 12

18 U.S.C. § 2256(8)(B) 7, 8

18 U.S.C. § 2256(8)(C) 9, 10, 12

18 U.S.C. § 2256(8)(D) 7, 8

CITATION TO THE OFFICIAL REPORTS BELOW

People of the State of Illinois v. Kenneth Alexander,
204 Ill. 2d 472, 791 N.E. 2d 506,
274 Ill.Dec. 414 (May 22, 2003)

BASIS FOR JURISDICTION IN THIS COURT

This Writ of Certiorari is filed pursuant to the May 22, 2003 opinion filed by the Illinois Supreme Court in this case. This Court has jurisdiction because the Illinois Child Pornography Statute, specifically 720 ILCS 5/11-20.1(a)(1) and (a)(6), violate the First Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. **U.S. Const., Amend. I:** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the People peaceably to assemble, and to petition the Government for a redress of grievances.

2. **720 ILCS 5/11-20.1**

   (a) A person commits the offense of child pornography who:

   (1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction or depicts by computer any child whom he knows or reasonably should know to be under the age of 18 or any institutionalized severely or profoundly mentally retarded person where such child or institutionalized severely or profoundly mentally retarded person is: . . .

   (ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child or institutionalized severely or profoundly mentally retarded person, and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child or institutionalized severely or profoundly mentally retarded person and the sex organs of another person or animal; or . . .

   (6) with knowledge of the nature or content thereof, possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child or

institutionalized severely or profoundly mentally retarded person whom the person knows or reasonably should know to be under the age of 18 or to be an institutionalized severely or profoundly mentally retarded person, engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection; . . .

3. **720 ILCS 5/11-20.1(f)(4).**

"Depict by computer" means to generate or create, or cause to be created or generated, a computer program or data that, after being processed by a computer either alone or in conjunction with one or more computer programs, results in a visual depiction on a computer monitor, screen, or display.

4. **720 ILCS 5/11-20.1(f)(5).**

"Depiction by computer" means a computer program or data that, after being processed by a computer either alone or in conjunction with one or more computer programs, results in a visual depiction on a computer monitor, screen, or display.

STATEMENT OF THE CASE

On February 27, 2002, defendant Kenneth Alexander was charged by indictment with numerous counts of child pornography, pursuant to Illinois Child Pornography Statutes 720 ILCS 5/11-20.1(a)(1)(ii) and 720 ILCS 5/11-20.1(a)(6). (C1-54) Defendant filed a Motion to Dismiss all counts of the indictment in the trial court, arguing that the Illinois Child Pornography Statutes under which he was charged constituted an unconstitutional abridgement of free speech pursuant to this Court's holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002). (C108-112) The trial court granted defendant's Motion to Dismiss on May 15, 2002, finding that the Illinois Child Pornography Statutes in question were overbroad in that they included a ban on "virtual child pornography", which is protected free speech pursuant to the First Amendment of the United States Constitution and pursuant to this Court's holding in *Ashcroft v. Free Speech Coalition*. (R51-57)

The People of the State of Illinois timely filed a Notice of Appeal to the Illinois Supreme Court. (C185) The Illinois Supreme Court reviewed the trial court's ruling *de novo*. (App. 11)

The Illinois Supreme Court decision below had two parts. First, the Court considered the constitutionality of the definition of "child" provided at 720 ILCS 5/11-20.1(f)(7). That definition provided, in pertinent part,

> 'child' includes a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is, or *appears to be* that of a person . . . under the age of 18 . . . 'child' also includes a film . . . that is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the film . . . is of a person under the age of 18.

The Illinois Supreme Court found that the language contained in the definition of child in subsection (f)(7), espe-

cially the "appears to be" language and the "conveys the impression" language, is indistinguishable from the offending language in §§ 2256 (8)(B) and 8(D) of the Federal Child Pornography Statute which was invalidated in *Ashcroft v. Free Speech Coalition*. (App. 19-20) Accordingly, the Court declared the definition of child at 720 ILCS 5/11-20.1(f)(7) unconstitutional. (App. 20) However, the Court found that the definition of child was severable from the remainder of the statute. (App. 21)

The second part of the Illinois Supreme Court's decision below is the subject of this Writ of Certiorari. In the second part of that opinion, the Illinois Supreme Court considered defendant's position that, even absent the offending language in the definition of child, the relevant portions of the Illinois Child Pornography Statute are unconstitutional on their face. As the Illinois Supreme Court stated below:

> The defendant contends that this holding does not dispose of this case. He claims that what remains of Section 11-20.1 after severing the definition of 'child' is still unconstitutional. Because each of the 54 counts against the defendant alleged that he possessed a 'depiction by computer' of a child engaged in sexual activity, he assails the definitions of 'depict' and 'depiction by computer' in Sections 11-20.1(f)(4) and 11-20.1(f)(5). The defendant asserts that these definitions, and Sections 11-20.1(a)(1) and 11-20.1(a)(6), which mention these terms, are not limited to actual children. Consequently, argues the defendant, the State Statute, like the Federal Statute in *Ashcroft*, fails strict scrutiny under *Ferber*. (App. 21)

The Illinois Supreme Court rejected defendant's contention. In doing so, the Court found that the word "child" as used in the Illinois Child Pornography Statutes means

"actual child". (App. 22-23) The Court therefore held that Sections 11-20.1(a)(1) and 11-20.1(a)(6) prohibit making and possessing sexually explicit computer depictions of any **ACTUAL** child under 18 years of age, and accordingly, that these sections pass strict scrutiny under *Ferber*. (App. 22-24)

ARGUMENT

A. The Illinois Child Pornography Statute Must Survive Strict Scrutiny.

Statutes which seek to limit, regulate, or ban sexually orientated material or pornography are considered content-based restrictions on free speech. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878 at 1885 (2000). When the government seeks to restrict speech based on its contents, the usual presumption of constitutionality is reversed; content-based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption. *Playboy Entertainment Group*, 120 S.Ct. at 1888.

Any statute which is designed to curtail or abridge content-based free speech under the First Amendment to the United States Constitution must survive the strict scrutiny standard, and may only survive if it is narrowly tailored to promote a compelling State interest. *United States v. Playboy*, 120 S.Ct. at 1886. Under the strict scrutiny standard, the legislature must use the *least restrictive means* consistent with attainment of the legislative goal, and if a less restrictive alternative would serve the government's purpose, the legislature must use that alternative. *United States v. Playboy*, 120 S.Ct. at 1886. The Illinois Child Pornography Statute is designed to curtail or abridge content-based Free Speech. Therefore, strict scrutiny applies.

B. *Ashcroft v. Free Speech Coalition* Struck Down Sections 2256(B) and 2256(D) of the CPPA.

The First Amendment commands, "Congress shall make no law . . . abridging the freedom of speech." U.S.C.A. Const. Amend. 1. However, the First Amendment right to free speech has its limits, and it does not embrace certain categories of speech, including obscenity and pornography produced with real children. *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 at 1399 (2002).

Specifically, there are two ways the government may ban pornography. The government may ban pornography which is obscene, which means that the pornography in question, taken as a whole, appeals to the purient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). The Illinois legislature has banned this type of material by enacting the obscenity statute, which is not at issue in this case.

The second category of pornography that can be banned by the government is pornography which is produced using real children. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348 (1982). The *Ferber* court distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. *Ferber*, 458 U.S. at 758. The *Ferber* court further stated that the State had a particular and compelling interest in prosecuting those who promote the sexual exploitation of children who are used in the process of producing child pornography. *Ferber*, 458 U.S. at 761. This Court in *Ferber* found that the act of producing child pornography using actual, real, identifiable children was "intrinsically related" to the sexual abuse of children in that the pornography created a permanent record of a child's sexual abuse and because the traf-

fic in child pornography was an economic motive for its production. *Ferber*, 458 U.S. at 759.

In *Ashcroft v. Free Speech Coalition*, this Court considered the constitutionality of Sections 2256(8)(B) and 2256(8)(D) of the Federal Child Pornography Prevention Act. The *Ashcroft* court found that Sections 2256(8)(B) and 2256(8)(D) expanded the federal prohibition on child pornography to include not only pornographic images made using **ACTUAL** children but also any depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct," (Section 2256(8)(B)), and any sexually explicit image that "conveys the impression" of a minor engaging in sexually explicit conduct. (Section 2256(8)(D)). *Ashcroft*, 122 S.Ct. at 1393. In other words, the *Ashcroft* court found that these two subsections ban a broad range of sexually explicit images, including "virtual child pornography", which appear to depict minors but were produced by means **OTHER** than using **REAL** children, such as through the use of youthful looking adults or computer imaging technology. *Ashcroft*, 122 S.Ct. at 1393.

The *Ashcroft* Court held that Sections 2256(8)(B) and 2256(8)(D) of the CPPA were overbroad and unconstitutional, as the language in those statutes covers materials beyond the categories recognized in *New York v. Ferber*. Rather, in contrast to the speech in *Ferber* which itself is the record of sexual abuse of **ACTUAL** children, these sections of the CPPA prohibit speech that records no crime and creates no victim by its production. The virtual child pornography is not "intrinsically related" to the sexual abuse of **REAL** children, as were the materials in *Ferber*. *Ashcroft*, 122 S.Ct. at 1402.

C. The United States Supreme Court Did Not Strike Down Sections 2256(A) and 2256(C) Of the CPPA.

This Court in *Ashcroft* did not strike down Sections 2256(8)(A) or 2256(8)(C) of the CPPA. Section 2256(8)(A)

bans child pornography if "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." Because the language in this statute explicitly bans only those depictions which **INVOLVE THE USE OF A MINOR IN THE PRODUCTION PROCESS**, this statute is supported by the holding in *New York v. Ferber*. That is, the statute advances the compelling governmental interest of protecting the exploitation of child abuse when real children are used in the production process of child pornography. Furthermore, the statute is narrowly tailored to advance that interest and is the least restrictive means consistent with the attainment of the legislative goal because it limits the prohibited conduct to those situations in which a minor is used in the production process. Therefore, Section 2256(8)(A) of the CPPA survives strict scrutiny and is constitutionally sound.

Section 2256(8)(C) of the Federal CPPA prohibits a more common and lower tech means of creating images of children, known as computer morphing. *Ashcroft*, 122 S.Ct. at 1397. Rather than creating original images, pornographers can alter innocent pictures of **REAL** children so that the children appear to be engaged in sexual activity. *Id.* Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of **REAL** children and are in that sense similar to the images in *Ferber*. Specifically, the language of 2256(8)(C) uses the word "**IDENTIFIABLE**" minor. Although this Court did not consider the constitutionality of Section 2256(8)(C), it is clear that, because the statute uses the term "identifiable" minor, the statute advances the compelling governmental interest of protecting actual, real, identifiable children who are used in the production process, and by using the term "identifiable" minor, the statute is narrowly tailored to achieve that goal. Therefore, Section 2256(8)(C) of the Federal CPPA also survives the strict scrutiny standard and is constitutionally valid.

D. The Illinois Child Pornography Statute, Even Absent The Offending Language of Subsection (f)(7), Does Not Survive Strict Scrutiny Pursuant To *Ashcroft*, As It Is Not Narrowly Tailored And Is Not The Least Restrictive Alternative To Advance The Governmental Interest Of Protecting Real Children.

On the other hand, the Illinois Child Pornography Statute does not pass the strict scrutiny test. The language of Subsections (a)(1) and (a)(6) is overbroad and is not narrowly tailored to advance the compelling governmental interest of protecting the sexual exploitation of real, actual children.

(1) 720 ILCS 5/11-20.1(a)(1)

Section 5/11-20.1(a)(1) states, in pertinent part,:

> "A person commits the offense of child pornography who films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or production **OR DEPICTS BY COMPUTER ANY CHILD** whom he knows or reasonably should know to be under the age of 18."

The definition of "depict by computer" at Section 5/11-20.1(f)(4) states,

> "Depict by computer" means to generate or create, or cause to be created or generated, a computer program or data that, after being processed by a computer either alone or in conjunction with one or more computer programs, results in a visual depiction on a computer monitor, screen, or display.

When you read Section 5/11-20.1(a)(1) and the definition of "depict by computer" at Section 5/11-20.1(f)(4) together, the following conduct is prohibited by Section 5/11-20.1(a)(1);

> **A person commits the offense of child pornography who creates a computer program that, after being processed by a computer, results in a visual depiction on a computer monitor of a child under the age of 18 who is engaged in sexually explicit conduct outlined in Subsections (i) through (vii).**

It is interesting that the Illinois legislature chose the word "creates" in their prohibition of child pornography. The word "create" lies at the heart of the First Amendment. According to the Illinois Child Pornography Statute at Section 5/11-20.1(a)(1), a person who sits down at their computer and artistically creates an image of a child engaged in sexual conduct using computer programs, computer imaging, or computer technology, can be prosecuted for child pornography. As distasteful as this may seem, as long as an actual child was not used in the production process, this activity is protected free speech. This is exactly the type of virtual child pornography which constitutes protected free speech under the First Amendment pursuant to this Court's holding in *Ashcroft*. Clearly, this Illinois statute is overbroad in that it prohibits the creation, or production of "virtual child pornography", which has been held by this Court to be protected free speech.

Furthermore, the Illinois legislature, in enacting Section 5/11-20.1, did not use the least restrictive means consistent with attainment of the legislative goal allowable under *New York v. Ferber*. In order for the legislature to use the least restrictive means in attaining this goal, the language of the statute must include language similar to the federal statutes 2256(8)(A) and 2256(8)(C). In other words, in order to pass the strict scrutiny test, the Illinois statute must include language which limits the ban on child pornography to that which either uses

actual children in the production process or depicts real, identifiable, or actual children.

The Illinois Child Pornography Statute does not limit the offense of child pornography to images which **ACTUALLY USE CHILDREN IN THE PRODUCTION PROCESS**. Nor does the Illinois Child Pornography Statute limit the offense to depictions of **ACTUAL, REAL,** or **IDENTIFIABLE** children. Therefore, Section 5/11-20.1(a)(1) of the Illinois Child Pornography statute is overbroad and unconstitutional, as it is not narrowly tailored to advance the compelling governmental interest of protecting the exploitation of children used in the production of child pornography. The statute is not narrowly tailored because the overbroad language of the statute, as set forth above, clearly includes the prohibition of virtual child pornography which, according to *Ashcroft*, does not advance the compelling State interest of protecting actual children used in the production of child pornography. *Ashcroft*, 122 S.Ct. at 1401-1402. For all of the foregoing reasons, Section 5/11-20.1 is unconstitutional.

(2) 720 ILCS 5/11-20.1(a)(6)

Section 5/11-20.1(a)(6) states, in pertinent part,:

> "A person commits the offense of child pornography who with knowledge of the nature or content thereof, possesses any . . . depiction by computer of any child . . . whom the person knows or reasonably should know to be under the age of 18 . . . engaged in any activity descr ed in subparagraphs (i) through (vii) of paragraph 1 of this subsection."

Section 720 ILCS 5/11-20.1(f)(5) defines "depiction by computer" as follows:

> "Depiction by computer means a computer program or data that, after being processed by a computer

> either alone or in conjunction with one or more computer programs, results in a visual depiction on a computer monitor, screen, or display."

Reading Section 5/11-20.1(a)(6) and 20.1(f)(5) together, the following conduct is prohibited,

> **A person commits the offense of child pornography who possesses any computer program that, after being processed by a computer results in a visual depiction on a computer monitor of any child under the age of 18 who is engaged in sexually explicit activity described in subparagraph (i) through (vii) of paragraph 1 of this subsection.**

In examining the language of Section (a)(6), a person who *possesses* an image of a child engaged in sexual activity which was created or processed using computer imaging, a computer program, or advanced computer technology can be prosecuted for child pornography. This would be the case even if a real child was not used in the production process. Therefore, clearly, Section 5/11-20.1(a)(6) also is overbroad in that it contains a prohibition of virtual child pornography as set forth in *Ashcroft*. The statute is simply not narrowly tailored to advance the compelling governmental interest of protecting **REAL** children used in the production of child pornography.

Furthermore, Section 5/11-20.1(a)(6) is not the least restrictive means consistent with the attainment of the legislative goal of protecting real, identifiable children used in the production of child pornography. That is, it does not limit the prosecution of child pornography to those instances in which an actual child is used in the production process, and does not limit the offending depictions to those which depict a real, identifiable, actual child. Therefore, Section 720 ILCS 5/11-20.1(a)(6) is unconstitutional.

E. The Illinois Supreme Court Erred In Finding That Sections 20.1(a)(1) And (a)(6) Pass The Strict Scrutiny Standard.

The Illinois Supreme Court attempts to save the Illinois Child Pornography Statutes by adding the word "actual" to modify the word "child". (App. 22-23) However, the Illinois Supreme Court's conclusion that "child" means "actual child" is misplaced in view of today's technological advances. As Congress has recognized, "new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are **VIRTUALLY INDISTINGUISHABLE** to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." (App. 13) Even the Illinois Supreme Court in *Alexander* recognized that, "[T]oday, however, as technological advances test the truth of the old saw that the camera does not lie, what falls within the category of child pornography has become increasingly unclear." (App. 13)

In view of the computer and technological advances described above, which are recognized in *Ashcroft v. Free Speech Coalition,* the Illinois Supreme Court is overly simplistic when it states that "child" must mean "actual child". This is not the case in today's age of computer and technological advances. This Court has drawn a distinction between virtual and actual child pornography, and the Illinois Supreme Court has ignored that distinction in construing the constitutionality of these statutes.

The Illinois Supreme Court is attempting to add an element to the offense of child pornography as defined in the statutes. The words "actual", "real", or "identifiable", do not appear anywhere in the text of the Illinois Child Pornography Statute. The word "child" appears in the Illinois statutes, without any definition of "child" and

without any of the above language to modify the term "child". This is impermissibly vague according to this Court's holding in *Ashcroft v. Free Speech Coalition*. The Illinois Supreme Court recognizes this defect, and attempts to cure the defect by adding the term "actual" to the words of the statute. To allow a court to add an element to an offense in order to narrowly tailor the statute would turn this Court's constitutional jurisprudence regarding the strict scrutiny standard on its face.

Therefore, the Illinois Supreme Court's holding that Sections 11-20.1(a)(1) and 11-20.1(a)(6) prohibit depictions of any **ACTUAL** child under 18 years of age is erroneous. If the language of a statute fails the strict scrutiny standard, then that statute must be declared unconstitutional. That statute cannot be "cured" by allowing a court to change or add language to the statute.

F. The Definitions Of "Depict By Computer" And "Depiction By Computer" Can Easily Be Interpreted As Specifically Prohibiting Virtual Child Pornography.

The Illinois Supreme Court states that defendant's argument regarding the definition of "depict by computer" and "depiction by computer" is a "flawed syllogism". (App. 23) The opinion states:

> *Ashcroft* invalidated content-based restrictions on virtual child pornography; virtual child pornography often contains computer-graphic images; therefore, *Ashcroft* invalidated restrictions on computer depictions of child pornography. (App. 23)

Although the above quotation certainly is an example of a "flawed syllogism", this "flawed syllogism" was **NOT** defendant's argument in the Illinois Supreme Court and is **NOT** defendant's argument to this Court.

Rather, defendant asks this Court to examine the plain language of the definitions of "depict by computer" and "depiction by computer" as set forth above. Under the plain meaning of those definitions, a person is guilty of possessing child pornography if that person **CREATES AN IMAGE OF A CHILD ENGAGED IN SEXUAL BEHAVIOR USING A COMPUTER PROGRAM**. Obviously, the above language can include actual photographs of real children which are displayed on a computer screen, but it can also include the type of virtual child pornography created by computer imaging technology that was discussed in the *Ashcroft* decision. Therefore, the Illinois Child Pornography Statute fails to distinguish between child pornography using real, actual, identifiable children in the production process, and virtual child pornography which is created using computer imaging and technology. The statute therefore fails strict scrutiny, and the Illinois Supreme Court has failed to follow this Court's holding in *Ashcroft*.

CONCLUSION

This Court in *Ashcroft v. Free Speech Coalition* drew a distinction between child pornography which uses actual children in the production process, and virtual child pornography which is created using computer imaging techniques and does not involve of the use of actual children in the production process. The former is prohibited speech under *Ferber*, and the latter is protected free speech pursuant to *Ashcroft*.

Sections 5/11-20.1(a)(1) and (a)(6) do not pass the strict scrutiny standard which is required when a statute is intended to limit otherwise free speech pursuant to the First Amendment. The language of the above mentioned statutes fails to distinguish between virtual child pornography and pornography using actual, real children

in the production process. Therefore, Sections 720 ILCS 5/11-20.1(a)(1) and (a)(6) are not narrowly tailored to advance the compelling governmental interest in protecting real children, and are unconstitutional.

For the foregoing reasons, the Illinois Supreme Court opinion below is inconsistent with this Court's holding in *Ashcroft*. This defendant therefore respectfully requests that this Honorable Court grant defendant's Petition for Writ of Certiorari to ensure that this Court's holding in *Ashcroft* is correctly applied to the Illinois Child Pornography Statutes.

Respectfully submitted,

DONALD J. MORRISON
Counsel of Record
MORRISON & MORRISON, P.C.
32 North West Street
Waukegan, Illinois 60085
(847) 244-2660

Attorney for Petitioner

APPENDIX

App. 1

No. 93952.
May 22, 2003.

(Cite as: 791 N.E.2d 506)
204 Ill.2d 472, 274 Ill.Dec. 414

Supreme Court of Illinois.

The PEOPLE of the State of Illinois, Appellant,

v.

Kenneth ALEXANDER, Appellee.

Defendant was charged with 45 counts of child pornography for possessing and intending to distribute computer depictions of children that he knew or reasonably should have known to be under 18 years of age engaged in various sexual activities. The Circuit Court, Lake County, James K. Booras, J., dismissed charges, declaring the child pornography statute unconstitutional. State appealed. The Supreme Court, Fitzgerald, J., held that: (1) by banning virtual child pornography, definition of child pornography within definition of "child" in child pornography statute was overbroad, and thus violated the First Amendment's free speech guarantee; (2) invalid definition was severable; but (3) provisions of child pornography statute that prohibited making and possessing sexually explicit computer depictions of any actual child under 18 years of age were constitutional.

(Cite as: 791 N.E.2d 506)

Reversed and remanded.

West Headnotes

(Cite as: 791 N.E.2d 506)

[1] KeyCite this headnote
30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General.

In an appeal from an order declaring a statute unconstitutional, review is de novo.

(Cite as: 791 N.E.2d 506)

[2] KeyCite this headnote
92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) k. Limitations on Doctrine in General.

The First Amendment, which applies to state actions through the Fourteenth Amendment, prohibits content-based restrictions on speech which do not survive so-called strict scrutiny. U.S.C.A. Const.Amends. 1, 14.

(Cite as: 791 N.E.2d 506)

[3] KeyCite this headnote
92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) k. Limitations on Doctrine in General.

Strict scrutiny of a content-based restriction on speech requires a court to find that the restriction is justified by

a compelling government interest and is narrowly tailored to achieve that interest. U.S.C.A. Const.Amend. 1.

(Cite as: 791 N.E.2d 506)

[4] KeyCite this headnote
92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) k. In General.

(Cite as: 791 N.E.2d 506)

92 Constitutional Law KeyCite this headnote
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(5) k. Libel and Slander; False Reports.

(Cite as: 791 N.E.2d 506)

92 Constitutional Law KeyCite this headnote
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(1) k. In General.

The First Amendment's vast and privileged sphere of free speech activities does not extend to incitement, fighting words, defamation, or obscenity. U.S.C.A. Const.Amend. 1.

(Cite as: 791 N.E.2d 506)

[5] KeyCite this headnote
92 Constitutional Law
92V Personal, Civil and Political Rights

92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(1) k. In General.

Content-based restrictions on child pornography satisfy strict scrutiny First Amendment analysis because child pornography is intrinsically related to child sexual abuse, and states have a compelling interest in safeguarding physical and psychological health of children; additionally, the value of child pornography is exceedingly modest, if not de minimis. U.S.C.A. Const.Amend. 1.

(Cite as: 791 N.E.2d 506)

[6] KeyCite this headnote
92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(1) k. In General.

(Cite as: 791 N.E.2d 506)

281 Obscenity KeyCite this headnote
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations.

By banning virtual child pornography, definition of child pornography within definition of "child" in the child pornography statute was overbroad, and thus violated the First Amendment's free speech guarantee, where definition included a computer depiction that "appeared to be" that of person under age 18 or "conveyed the impression" that it depicted a person under age 18. S.H.A. 720 ILCS 5/11-20.1(f)(7).

(Cite as: 791 N.E.2d 506)

[7] KeyCite this headnote
281 Obscenity
281k5 Obscene Publications, Pictures, and Articles
281k5.2 k. Films and Pictorial Representations.

Presuming the General Assembly did not intend an absurd result, the Supreme Court would read the definition of "child" in the child pornography statute as a definition of "child pornography," where definition included "film, videotape, photograph, other similar visual medium or reproduction or depiction by computer." S.H.A. 720 ILCS 5/11-20.1(f)(7).

(Cite as: 791 N.E.2d 506)

[8] KeyCite this headnote
361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(1) k. In General.

Severability involves a two-part inquiry: first, the Supreme Court must determine whether the valid and invalid portions of the statute are essentially and inseparably connected in substance, and, second, it must determine whether the legislature would have enacted the valid portions without the invalid portions.

(Cite as: 791 N.E.2d 506)

[9] KeyCite this headnote
361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(1) k. In General.

The inquiry required to determine severability of an invalid portion of a statute is a question of legislative intent.

(Cite as: 791 N.E.2d 506)

[10] KeyCite this headnote
361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(6) k. Public Offenses, Prosecutions, and Punishments.

Invalid definition of "child" in the child pornography statute was not inseparably connected to remainder of statute, and thus was severable from the remainder, even though the public act that created it did not contain its own specific severability provision, where statute existed for 16 years without the definition of child. S.H.A. 720 ILCS 5/11-20.1(f)(7).

(Cite as: 791 N.E.2d 506)

[11] KeyCite this headnote
92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.4 Obscenity and Pornography
92k90.4(1) k. In General.

(Cite as: 791 N.E.2d 506)

281 Obscenity KeyCite this headnote
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations.

Provisions of child pornography statute that prohibited making and possessing sexually explicit computer depictions of any actual child under 18 years of age were constitutional under Ferber's strict scrutiny First Amendment analysis for content-based restrictions on free speech. U.S.C.A. Const.Amend. 1; S.H.A. 720 ILCS 5/11-20.1(a)(1, 6).

(Cite as: 791 N.E.2d 506)

[12] KeyCite this headnote
92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k47 k. Scope of Inquiry in General.

In determining the constitutionality of a statute, a reviewing court must first ascertain the statute's meaning by applying ordinary rules of construction and then decide whether, as construed, the statute comports with constitutional requirements.

(Cite as: 791 N.E.2d 506)

[13] KeyCite this headnote
361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General.

In interpreting a statute, the primary rule of construction is to ascertain and effectuate the legislature's intent.

(Cite as: 791 N.E.2d 506)

[14] KeyCite this headnote
361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General.

Courts look to the language of the statute as the best indication of the legislature's intent, and it gives statutory terms their ordinary meaning.

(Cite as: 791 N.E.2d 506)

[15] KeyCite this headnote
281 Obscenity
281k5 Obscene Publications, Pictures, and Articles
281k5.2 k. Films and Pictorial Representations.

In the context of virtual child pornography, the State could never satisfy scienter requirement of child pornography statute that a defendant "know or reasonably should know" that the child depicted is under the age of 18, because a virtual child is ageless. S.H.A. 720 ILCS 5/11-20.1(a)(1, 6).

(Cite as: 791 N.E.2d 506)

West Codenotes
Held Unconstitutional
S.H.A. 720 ILCS 5/11-20.1(f)(7).

*508(Cite as: 791 N.E.2d 506, *508)

James E. Ryan, Lisa Madigan, Attorneys General, Springfield, Michael J. Waller, State's Attorney, Waukegan

(Joel D. Bertocchi, Solicitor General, William L. Browers, David P. Haslett, Mary Beth Burns and Lisa Anne Hoffman, Assistant Attorneys General, Chicago, of counsel), for the People.

Morrison & Morrison, P.C., Waukegan (Donald J. Morrison, of counsel), for appellee.

Justice FITZGERALD delivered the opinion of the court:

The sole issue in this case is whether our state's prohibition of so-called virtual child pornography suffers from the same constitutional infirmity that doomed the federal prohibition of virtual child pornography in Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). We hold that it does, but that it is severable from the remainder of the child pornography statute. Accordingly, we reverse and remand for further (Cite as: 791 N.E.2d 506, *508) proceedings.

BACKGROUND

On February 27, 2002, the defendant was indicted in the circuit court of Lake County on 45 counts of child pornography under section 11-20.1(a)(1)(ii) and 9 counts of child pornography under section 11-20.1(a)(6) of the Criminal Code of 1961. See 720 ILCS 5/11-20.1(a)(1)(ii), (a)(6) (West Supp.2001). The indictment charged that the defendant possessed and intended to distribute computer depictions of children that he knew or reasonably should have known to be under 18 years of age engaged in various sexual activities.

The defendant entered a guilty plea to the first five counts in exchange for a seven-year sentence, but later withdrew his plea after the United States Supreme Court

decided Ashcroft. He then filed a motion to dismiss the indictment, asserting that sections 11-20.1(a)(1) and 11-*509 (Cite as: 791 N.E.2d 506, *509) 20.1(a)(6) facially violated the federal and state constitutions. The defendant argued that the "depict by computer" language in section 11-20.1(a)(1) and the "depiction by computer" language in section 11-20.1(a)(6) prohibit virtual child pornography protected by Ashcroft. According to the defendant, "These Illinois statutes extend Illinois' prohibition against child pornography to sexually explicit images that appear to depict minors but were produced by computer without using any real children."

On May 15, 2002, the trial court granted the defendant's motion, finding (Cite as: 791 N.E.2d 506, *509) sections 11-20.1(a)(1) and 11-20.1(a)(6) unconstitutional. The court stated:

> "In as far as the Illinois statute is concerned, the statute was, of course, created before the pronouncements of the Supreme Court in the Ashcroft case. I find the Illinois statute to be * * * as overbroad as the federal statute because it allows for someone possessing a computer-generated image to be convicted as if he were to have possessed a real child's picture, and that's something that the Constitution does not allow. That's something that the U.S. Supreme Court does not allow.
>
> I read the Illinois statute to be similar to the federal statute, where a computer-generated picture might show someone that appears as a minor or conveys the impression that the material is a minor. * * * [B]ecause the Illinois statute allows someone to be prosecuted and convicted because he possesses a depiction by computer of any child and does not make the distinction of real child or live child or an identifiable child; thus, the Illinois statute constitutionally fails gravely.

* * *

> Therefore, insofar as this indictment pertains to those two sections of the statute that involve virtual children, that involve computer-generated images or children depicted by computer, this motion to dismiss will be granted." (Emphases added.)

The State appealed directly to this court. See 134 Ill.2d R. 603. (Cite as: 791 N.E.2d 506, *509)

ANALYSIS

[1] In an appeal from an order declaring a statute unconstitutional, our review is de novo. In re Adoption of K.L.P., 198 Ill.2d 448, 453, 261 Ill.Dec. 492, 763 N.E.2d 741 (2002).

1. The First Amendment, Child Pornography, and Ashcroft

[2][3] The first amendment (see U.S. Const., amend. I), which applies to state actions through the fourteenth amendment (see U.S. Const., amend. XIV; De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 282 (1937)), [FN1] prohibits content-based restrictions on speech which do not survive so-called strict scrutiny. Strict scrutiny requires a court to find that the restriction is justified by a compelling government interest and is narrowly tailored to achieve that interest. People v. Sanders, 182 Ill.2d 524, 530, 231 Ill.Dec. 573, 696 N.E.2d 1144 (1998); Tully v. Edgar, 171 Ill.2d 297, 304-05, 215 Ill.Dec. 646, 664 N.E.2d 43 (1996).

> FN1. See also Ill. Const.1970, art. I, § 4 ("All persons may speak, write and publish freely, being responsible for the abuse of that liberty").

[4] The United States Supreme Court has held that content-based restrictions on certain categories of speech satisfy strict scrutiny. The first (Cite as: 791 N.E.2d 506, *509) amendment's "vast and privileged sphere" (Ashcroft, 535 U.S. at 244, 122 S.Ct. at 1399, 152 L.Ed.2d at 417) does not extend to incitement (see Brandenburg *510 (Cite as: 791 N.E.2d 506, *510) v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)), fighting words (see Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)), defamation (see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)), or obscenity (see Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)).

[5] In New York v. Ferber, 458 U.S. 747, 763, 102 S.Ct. 3348, 3358, 73 L.Ed.2d 1113, 1126 (1982), the Court added child pornography as another category of speech outside the protection of the first amendment. Content-based restrictions on child pornography satisfy strict scrutiny because child pornography is "intrinsically related" to child sexual abuse, and states have a compelling interest in safeguarding the physical and psychological health of children. Ferber, 458 U.S. at 756-59, 102 S.Ct. at 3354-56, 73 L.Ed.2d at 1122-24. Additionally, the value of child pornography is "exceedingly modest, if not de minimis." Ferber, 458 U.S. at 762, 102 S.Ct. at 3357, 73 L.Ed.2d at 1126. The Court observed that there are parameters on the category of child pornography, and consequently on the states' ability to regulate it: "As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively (Cite as: 791 N.E.2d 506, *510) construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age." (Emphasis omitted.) Ferber, 458 U.S. at 764, 102 S.Ct. at 3358, 73 L.Ed.2d at 1127.

Today, however, as technological advances test the truth of the old saw that the camera does not lie (see 4 R. Rotunda & J. Nowak, Constitutional Law § 20.61(b), at 79 (3d ed. Supp.2003)), what falls within the category of child pornography has become increasingly unclear. As Congress has recognized, " 'new photographic and computer imagining [sic] technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.' " 18 U.S.C. § 2251, Congressional Findings, note (5) (2000), quoting Pub.L. 104- 208, 110 Stat. 3009. In response, Congress targeted the growing traffic in this virtual child pornography with the Child Pornography Prevention Act of 1996 (CPPA).

In Ashcroft, an adult entertainment industry trade association challenged the facial validity under the first amendment of two definitional sections of the CPPA. Section 2256(8)(B) defined child pornography as "any visual depiction, including any photograph, film, video, picture, or computer (Cite as: 791 N.E.2d 506, *510) or computer- generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where * * * such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct." (Emphasis added.) 18 U.S.C. § 2256(8)(B) (2000). Section 2256(8)(D) defined child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where * * * such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual de-

piction of a minor engaging in sexually explicit conduct." (Emphasis added.) 18 U.S.C. *511 (Cite as: 791 N.E.2d 506, *511) § 2256(8)(D) (2000). In short, section 2256(8)(B) addressed virtual child pornography, and section 2256(8)(D) addressed materials pandered or marketed as child pornography. The trade association asserted that these sections were overbroad and had a chilling effect, preventing its members from producing constitutionally protected works. The federal district court granted summary judgment to the government; the court of appeals reversed (Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999)).

The Court affirmed, holding that these sections were overbroad and violative of the first amendment. Ashcroft, 535 U.S. at 256, 258, 122 S.Ct. at 1405, 1406, 152 L.Ed.2d at 425, 426. The Court noted that, unlike actual child (Cite as: 791 N.E.2d 506, *511) pornography, virtual child pornography "do[es] not involve, let alone harm, any children in the production process" (Ashcroft, 535 U.S. at 241, 122 S.Ct. at 1397, 152 L.Ed.2d at 415); virtual child pornography has no link to the crime of child sexual abuse. The Court elaborated:

> "In contrast to the speech in Ferber, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in Ferber. 458 U.S., at 759 [102 S.Ct. 3348]. While the Government asserts that the images can lead to actual instances of child abuse [citation], the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." Ashcroft, 535 U.S. at 250, 122 S.Ct. at 1402, 152 L.Ed.2d at 421.

The Court rejected the government's argument that such indirect effects were sufficient to pass constitutional muster because the value of child pornography is de minimis:

> "Ferber did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value [citation], but relied on virtual images-the very images prohibited by the CPPA—as an alternative and permissible means of expression: '[I]f it were necessary for literary or artistic value, a person (Cite as: 791 N.E.2d 506, *511) over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative.' [Ferber, 458 U.S. at 763, 73 L.Ed.2d at 1126, 102 S.Ct. at 3357]. Ferber, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. Ferber provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well." Ashcroft, 535 U.S. at 251, 122 S.Ct. at 1402, 152 L.Ed.2d at 421-22.

In short, sections 2256(8)(B) and 2256(8)(D) did not pass strict scrutiny because, unlike the child pornography statute at issue in Ferber, they were not narrowly tailored to advance the government's compelling interest in protecting actual children from sexual abuse.

2. The Illinois Child Pornography Statute

[6] We turn now to examine the effect of Ashcroft on the Illinois child pornography statute. Section 11-20.1(a) provides in relevant part:

"(a) A person commits the offense of child pornography who:

(1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or *512 (Cite as: 791 N.E.2d 506, *512) reproduction or depicts by computer any child whom he knows or reasonably should know to be under the age of 18 or any severely or profoundly mentally retarded person where such child or severely or profoundly mentally retarded person is: (Cite as: 791 N.E.2d 506, *512)

* * *

(ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child or severely or profoundly mentally retarded person and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child or severely or profoundly mentally retarded person and the sex organs of another person or animal; or

* * *

(6) with knowledge of the nature or content thereof, possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child or severely or profoundly mentally retarded person whom the person knows or reasonably should know to be under the age of 18 or to be a severely or profoundly mentally retarded person, engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection[.]" 720 ILCS 5/11-20.1(a) (West Supp.2001).

[7] Section 11-20.1(f) provides definitions of, inter alia, "depict by computer," "depiction by computer," and "child":

"(4) 'Depict by computer' means to generate or create, or cause to be created or generated, a computer program or data that, after being processed by a computer either alone or in conjunction with one or more computer programs, results in a visual depiction on a computer monitor, screen, or display.

(5) 'Depiction by computer' means a computer program or data that, (Cite as: 791 N.E.2d 506, *512) after being processed by a computer either alone or in conjunction with one or more computer programs, results in a visual depiction on a computer monitor, screen, or display.

* * *

(7) 'Child' includes a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is, or appears to be, that of a person, either in part, or in total, under the age of 18, regardless of the method by which the film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer is created, adopted, or modified to appear as such. 'Child' also includes a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer is of a person under the age of 18." (Emphases added.) 720 ILCS 5/11-20.1(f) (West Supp.2001). [FN2]

FN2. We note that section 11-20.1(f)(7) contains a serious syntax problem. If we insert this definition of "child" into the substantive offense

> of child pornography, the statute proscribes filming, videotaping, photographing, or depicting by other similar visual media or by computer (Cite as: 791 N.E.2d 506, *512) any film, videotape, photograph, other similar visual media, or computer depiction. The statute becomes circular; it bans pictures and movies of pictures and movies. In oral argument, the State acknowledged this anomaly and intimated that the definition of "child" is actually a definition of "child pornography." This interpretation is not entirely satisfactory because section 11-20.1(a) in a sense already defines child pornography, but the statute is similar to the federal statute at issue in Ashcroft in this regard. We presume the General Assembly did not intend an absurd result (A.P. Properties, Inc. v. Goshinsky, 186 Ill.2d 524, 532, 239 Ill.Dec. 600, 714 N.E.2d 519 (1999)), and we read the definition of "child" as a definition of "child pornography" (see People v. Garrison, 82 Ill.2d 444, 455, 45 Ill.Dec. 132, 412 N.E.2d 483 (1980) (holding that a court may alter, supply, or modify words to correct obvious legislative drafting mistakes)).

*513 (Cite as: 791 N.E.2d 506, *513) The current child pornography statute is a reenactment of an earlier statute, which was struck down because it violated the single-subject rule (see People v. Cervantes, 189 Ill.2d 80, 243 Ill.Dec. 233, 723 N.E.2d 265 (1999)), with two modifications: "One is that possession of child pornography must be voluntary in order to be considered criminally liable of that violation, and it expands the definition of a 'child.' This is intended to (Cite as: 791 N.E.2d 506, *513) address the issue of morphing, where they morph different parts of bodies." (Emphasis added.) 91st Ill. Gen. Assem., Senate

Proceedings, May 11, 1999, at 36 (statements of Senator Sullivan).

This description of morphing is less than clear. In Ashcroft, the Court described computer morphing as

> "a more common and lower tech means of creating virtual images * * *. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in Ferber." Ashcroft, 535 U.S. at 242, 122 S.Ct. at 1397, 152 L.Ed.2d at 416.

The computer-morphing provision of the CPPA bars depictions of identifiable children. See 18 U.S.C. § 2256(8)(C) (2000). The definition of "child" in section 11-20.1(f)(7), by contrast, does not refer to identifiable children, and, accordingly, does not proscribe computer morphing as defined by the Court. Instead, section 11-20.1(f)(7) goes beyond morphing to attack the same virtual and pandered child pornography targeted by sections 2256(8)(B) and 2256(8)(D) of the CPPA. The parties seem to agree in their briefs that section 11-20.1(f)(7) is unconstitutional because its language is indistinguishable from the language of the CPPA invalidated in Ashcroft. At (Cite as: 791 N.E.2d 506, *513) first glance, then, this case seems straightforward: apply Ashcroft, strike the statute, and affirm. A closer review of the record reveals that our task is not so easy.

In his motion to dismiss, the defendant challenged the constitutionality of sections 11-20.1(a)(1) and 11-20.1(a)(6), not section 11-20.1(f)(7). The defendant, however, discussed Ashcroft and noted that the Court was troubled by the CPPA's "appears to be" and "conveys and impression"

language. The trial court clearly recognized that this constitutionally problematic language also appeared in the state statute: "I read the Illinois statute to be similar to the federal statute, where a computer-generated picture might show someone that appears as a minor or conveys the impression that the material is a minor." (Emphasis added.) Though the court did not strike section 11-20.1(f)(7), which contains this language, and, instead, struck two entirely separate provisions, which simply define the substantive offense of child pornography, the court's comments were broad enough to bring the issue of the constitutionality of section 11-20.1(f)(7) before this court. Section 11-20.1(f)(7), not sections 11-20.1(a)(1) and 11-20.1(a)(6), raises the concerns voiced in Ashcroft. Section 11-20.1(f)(7), not sections *514 (Cite as: 791 N.E.2d 506, *514) 11-20.1(a)(1) and 11-20.1(a)(6), is unconstitutional. See 155 Ill.2d R. 366(a)(5) ("In all appeals the reviewing court may, in its discretion, and on such terms as it deems just, * * * enter any judgment and make any order that ought to have been given or made"). (Cite as: 791 N.E.2d 506, *514)

[8][9][10] The State contends that section 11-20.1(f)(7) is severable from the remainder of the child pornography statute. Public Act 91-229, which added section 11-20.1(f)(7), did not contain its own specific severability provision. Accordingly, we look to the Statute on Statutes' general severability provision: "If any provision of an Act * * * is held invalid, such invalidity does not affect other provisions * * * of the Act which can be given effect without the invalid * * * provision, and to this end the provisions of each Act * * * are severable, unless otherwise provided by the Act." 5 ILCS 70/1.31 (West 2000). Severability involves a two-part inquiry. First, we must determine "whether the valid and invalid portions of the statute are essentially and inseparably connected in substance." See Fiorito v. Jones, 39 Ill.2d 531, 540, 236 N.E.2d

698 (1968). Second, we must determine whether the legislature would have enacted the valid portions without the invalid portions. See People v. Warren, 173 Ill.2d 348, 372, 219 Ill.Dec. 533, 671 N.E.2d 700 (1996). This inquiry is a question of legislative intent.

Section 11-20.1(f)(7) is not inseparably connected to the child pornography statute because the statute existed for 16 years without the definition of "child." Further, the General Assembly would have enacted the child pornography statute without section 11-20.1(f)(7); it did just that in 1984. We conclude that the General Assembly would prefer to leave the remaining (Cite as: 791 N.E.2d 506, *514) portions of the statute in effect. Accordingly, we strike only section 11- 20.1(f)(7). See People v. Watts, 181 Ill.2d 133, 151, 229 Ill.Dec. 542, 692 N.E.2d 315 (1998) (holding that a statutory provision was severable where it was added six years after the statute was enacted); see also United States v. Kelly, 314 F.3d 908, 912 (7th Cir. 2003) (holding that Ashcroft invalidated only two definitions of virtual child pornography and left intact a valid definition of traditional child pornography under which the defendant was convicted).

[11] The defendant contends that this holding does not dispose of this case. He claims that what remains of section 11-20.1 after severing the definition of "child" is still unconstitutional. Because each of the 54 counts against the defendant allege that he possessed a "depiction by computer" of a child engaged in sexual activity, he assails the definitions of "depict" and "depiction by computer" in sections 11-20.1(f)(4) and 11-20.1(f)(5). The defendant asserts that these definitions, and sections 11-20.1(a)(1) and 11-20.1(a)(6), which mention these terms, are not limited to actual children. Consequently, argues the defendant, the state statute, like the federal statute in Ashcroft, fails strict scrutiny under Ferber.

[12][13][14] "In determining the constitutionality of a statute, a reviewing court must first ascertain the statute's meaning by applying ordinary rules of construction and then decide whether, as construed, the statute (Cite as: 791 N.E.2d 506, *514) comports with constitutional requirements." In re Application for Judgment & Sale of Delinquent Properties for the Tax Year 1989, 167 Ill.2d 161, 168, 212 Ill.Dec. 215, 656 N.E.2d 1049 (1995). That is, before we can determine whether sections 11-20.1(f)(4) and 11-20.1(f)(5)—and concomitantly sections 11-20.1(a)(1) and 11-20.1(a)(6)—are impermissible content-based restrictions on speech warranting strict scrutiny, we must determine what they mean. In interpreting a statute, the primary rule of construction is to ascertain *515 (Cite as: 791 N.E.2d 506, *515) and effectuate the legislature's intent. See Kraft, Inc. v. Edgar, 138 Ill.2d 178, 189, 149 Ill.Dec. 286, 561 N.E.2d 656 (1990). We look to the language of the statute as the best indication of this intent, and we give the statutory terms their ordinary meaning. Opyt's Amoco, Inc. v. Village of South Holland, 149 Ill.2d 265, 277, 172 Ill.Dec. 390, 595 N.E.2d 1060 (1992).

[15] Because we have concluded that the definition of "child" in section 11-20.1(f)(7) is constitutionally infirm, we must resort to plain language. "Child" means "a young person of either sex esp. between infancy and youth." See Webster's Third New International Dictionary 388 (1993). "Person," in turn, means "an individual human being" or "a human being as distinguished from an animal or thing." See Webster's Third New International Dictionary 1686 (1993); see also Ill.Rev.Stat.1981, ch. 38, par. 11-20a(a)(3) (child pornography " '[m]atter' " means "any photographic product depicting actual (Cite as: 791 N.E.2d 506, *515) human models or actors, whether in the form of still photographs, motion pictures, or videotape" (emphasis added)). "Child" means young human being; child

means actual child. Further, sections 11-20.1(a)(1) and 11-20.1(a)(6) both require that the defendant "knows or reasonably should know" that the child depicted is under the age of 18. See 720 ILCS 5/11-20.1(a)(1), (a)(6) (West Supp.2001). In the context of virtual child pornography, the State could never satisfy this scienter requirement because a virtual child is ageless. We hold that sections 11-20.1(a)(1) and 11-20.1(a)(6) prohibit, inter alia, making and possessing sexually explicit computer depictions of any actual child under 18 years of age. Accordingly, these sections pass strict scrutiny under Ferber.

Statutory interpretation aside, the defendant's argument is essentially a flawed syllogism: Ashcroft invalidated content-based restrictions on virtual child pornography; virtual child pornography often contains computer- graphic images; therefore, Ashcroft invalidated restrictions on computer depictions of child pornography. But not all computer depictions of child pornography are virtual child pornography. In fact, the depict/depiction-by-computer provisions have nothing to do with the content of the images—whether actual or virtual—and everything to do with the method by which they are displayed. See 88th Ill. Gen. Assem., Senate Proceedings, December 1, 1994, at 45 (statements of Senator Dudycz) (Senate Bill 1153, which added the (Cite as: 791 N.E.2d 506, *515) depict/depiction-by-computer provisions, "expands child pornography to include computer distributed pornography" (emphasis added)). The addition of computer images to the statute simply recognized the technological reality that child pornography could be memorialized in a computer's memory at least as easily as it could be memorialized on paper, film, or videotape. This reading is entirely consistent with Ashcroft, which did not strike that part of the CPPA defining "child pornography" as "any visual depiction, including any photograph, film, video, picture, or computer or computer generated image

or picture, whether made or produced by electronic, mechanical, or other means." (Emphasis added.) 18 U.S.C. § 2256(8) (2000).

Ashcroft addressed only the question of whether a criminal prohibition of virtual child pornography—child pornography produced without using actual children—violated the first amendment. It did not invalidate all child pornography laws. We need not revisit the issue of whether criminalizing child pornography of actual, not virtual, children violates the first amendment. That issue was answered conclusively and convincingly in Ferber, and the Illinois child pornography statute comports *516 (Cite as: 791 N.E.2d 506, *516) with that case. See People v. Lamborn, 185 Ill.2d 585, 590, 236 Ill.Dec. 764, 708 N.E.2d 350 (1999).

CONCLUSION

For the reasons that we have discussed, we reverse and remand for further (Cite as: 791 N.E.2d 506, *516) proceedings.

Reversed and remanded.

Ill.,2003.

People v. Alexander

791 N.E.2d 506, 204 Ill.2d 472, 274 Ill.Dec. 414

END OF DOCUMENT